

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
SOUTHEASTERN DIVISION**

FRANK CLIFFORD PARRY, IV,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 1:21-CV-163 CDP
	)	
JOSH TOMLIN, et al.,	)	
	)	
Defendants.	)	

**MEMORANDUM AND ORDER**

This matter is before the Court on the motion of plaintiff Frank Clifford Parry, IV, an inmate at the Pemiscot County Jail, for leave to commence this civil action without prepaying fees or costs. Having reviewed the motion and the financial information submitted in support, the Court has determined to grant the motion, and assess an initial partial filing fee of \$1.00. *See* 28 U.S.C. § 1915. Furthermore, based upon a review of the complaint, the Court finds that the complaint should be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B).

**28 U.S.C. § 1915(b)(1)**

Pursuant to 28 U.S.C. § 1915(b)(1), a prisoner bringing a civil action *in forma pauperis* is required to pay the full amount of the filing fee. If the prisoner has insufficient funds in his prison account to pay the entire fee, the Court must assess and, when funds exist, collect an initial partial filing fee of 20 percent of the greater of (1) the average monthly deposits in the prisoner's account, or (2) the average monthly balance in the prisoner's account for the prior six-month period. After payment of the initial partial filing fee, the prisoner is required to make monthly payments of 20 percent of the preceding month's income credited to his account. 28 U.S.C. § 1915(b)(2). The

agency having custody of the prisoner will forward these monthly payments to the Clerk of Court each time the amount in the account exceeds \$10.00, until the filing fee is fully paid. *Id.*

Plaintiff has failed to submit a *certified* prison account statement. As a result, the Court will require plaintiff to pay an initial partial filing fee of \$1.00. *See Henderson v. Norris*, 129 F.3d 481, 484 (8th Cir. 1997) (when a prisoner is unable to provide the Court with a certified copy of his prison account statement, the Court should assess an amount “that is reasonable, based on whatever information the court has about the prisoner’s finances.”). If plaintiff is unable to pay the initial partial filing fee, he must submit a *certified* copy of his prison account statement in support of his claim.

### **Legal Standard on Initial Review**

This Court is required to dismiss a complaint filed *in forma pauperis* if it is frivolous, malicious, or fails to state a claim upon which relief may be granted. 28 U.S.C. § 1915(e)(2). An action is frivolous if it “lacks an arguable basis in either law or fact.” *Neitzke v. Williams*, 490 U.S. 319, 328 (1989). An action fails to state a claim upon which relief may be granted if it does not plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

A claim is facially plausible when the plaintiff “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Determining whether a complaint states a plausible claim for relief is a context-specific task that requires the reviewing court to draw upon judicial experience and common sense. *Id.* at 679. The court must assume the veracity of well-pleaded facts but need not accept as true “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Id.* at 678 (citing *Twombly*, 550 U.S. at 555).

This Court must liberally construe complaints filed by laypeople. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). This means that “if the essence of an allegation is discernible,” the court should “construe the complaint in a way that permits the layperson’s claim to be considered within the proper legal framework.” *Solomon v. Petray*, 795 F.3d 777, 787 (8th Cir. 2015) (quoting *Stone v. Harry*, 364 F.3d 912, 914 (8th Cir. 2004)). However, even *pro se* complaints must allege facts which, if true, state a claim for relief as a matter of law. *Martin v. Aubuchon*, 623 F.2d 1282, 1286 (8th Cir. 1980). Federal courts are not required to assume facts that are not alleged, *Stone*, 364 F.3d at 914-15, nor are they required to interpret procedural rules so as to excuse mistakes by those who proceed without counsel. *See McNeil v. United States*, 508 U.S. 106, 113 (1993).

### **The Complaint**

Plaintiff, Frank Clifford Parry, IV, filed the instant complaint on or about November 12, 2021 pursuant to 42 U.S.C. § 1983 against the following defendants: Josh Tomlin (Prosecutor); Leann Ryan (Assistant Prosecutor)<sup>1</sup>; Gabyn Hazel (Assistant Prosecutor); William Edward Reeves (Judge); James D. Keen (Assistant Public Defender).

Plaintiff asserts that he was told by his wife on October 19, 2021, that her public defenders, James Keen and Jonathon Grays, as well as prosecuting attorneys Josh Tomlin, Leann Ryan and Gabyn Hazel, made her redo another interview in the criminal case against him in Pemiscot County Court in order to get her to “lie on” him. Plaintiff claims that he is being falsely accused of “something he and his wife did not do” and that prosecutor Leann Ryan is changing dates on his case.

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<sup>1</sup>Plaintiff filed a motion to substitute party on December 8, 2021. He indicates that defendant Leann Rymes’ real name is Leann Ryan. The Court will grant plaintiff’s motion to substitute party and instruct the Clerk to change defendant’s name on the docket.

Plaintiff asserts that the victim in the case, a six-year-old child, has lied about the allegations in a deposition, and she was pulled out of the courtroom by prosecutors Leann Ryan and Josh Tomlin. Plaintiff claims that after speaking with prosecutors, the victim came back to the stand and “changed her story.”

Plaintiff asserts that his attorney in the case, also an Assistant Public Defender, waived his right to preliminary hearing without his consent. He further claims that his wife’s Assistant Public Defender had her write a statement for the prosecutor so she could be a witness against him.

Plaintiff seeks 1 million dollars in damages in this lawsuit, as well as removal of the prosecutors and the Judge in his state criminal action.

### **Discussion**

The complaint as brought by plaintiff is subject to dismissal pursuant to 28 U.S.C. § 1983. First, plaintiff’s allegations against Judge William Edward Reeves are subject to dismissal. Because judicial officers, exercising the authority with which they are vested, should be free to act upon their own convictions, judges are immune from suit for actions taken in their judicial capacity. *Hamilton v. City of Hayti, Missouri*, 948 F.3d 921, 925 (8<sup>th</sup> Cir. 2020). “Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages.” *Mireles v. Waco*, 502 U.S. 9, 11 (1991). This immunity applies even when the judge is accused of acting maliciously or corruptly. *Pierson v. Ray*, 386 U.S. 547, 554 (1967). *See also Woodworth v. Hulshof*, 891 F.3d 1083, 1090 (8<sup>th</sup> Cir. 2018) (stating that “judicial immunity is not overcome by allegations of bad faith or malice”). Moreover, “a judge will not be deprived of his immunity because the action he took was in error or was in excess of his authority.” *Justice Network, Inc. v. Craighead Cty.*, 931 F.3d 753, 760 (8<sup>th</sup> Cir. 2019).

A judge's immunity from § 1983 actions bars a plaintiff's recovery in all but two narrow sets of circumstances. *Schottel v. Young*, 687 F.3d 370, 373 (8<sup>th</sup> Cir. 2012). First, a judge does not have immunity for non-judicial actions. *Duty v. City of Springdale, Ark.*, 42 F.3d 460, 462 (8<sup>th</sup> Cir. 1994). "An act is a judicial act if it is one normally performed by a judge and if the complaining party is dealing with the judge in his judicial capacity." *Birch v. Mazander*, 678 F.2d 754, 756 (8<sup>th</sup> Cir. 1982). *See also Justice Network, Inc.*, 931 F.3d at 760 (stating "that to determine whether an act is judicial, courts look to the particular act's relation to the general function normally performed by a judge").

Second, a judge is not immune from lawsuits based on actions taken in the complete absence of jurisdiction. *Duty*, 42 F.3d at 462. This is the case even if the judge's actions were judicial in nature. *Schottel*, 687 F.3d at 373. In the context of judicial immunity, however, the scope of the judge's jurisdiction is construed broadly. *Justice Network, Inc.*, 931 F.3d at 762. "[A]n action – taken in the very aid of the judge's jurisdiction over a matter before him – cannot be said to have been taken in the absence of jurisdiction." *Mireles*, 502 U.S. at 13.

Plaintiff has not indicated that Judge William Reeves acted outside his jurisdiction in plaintiff's criminal matters in state court. Thus, this Court cannot find that plaintiff's allegations against him are able to maintain an action pursuant to 42 U.S.C. § 1983.

Plaintiff's claims against the prosecutorial defendants are also subject to dismissal. Prosecutors are immune from § 1983 liability so long as the actions complained of appear to be within the scope of prosecutorial duties. *Price v. Moody*, 677 F.2d 676, 677 (8<sup>th</sup> Cir. 1982). *See also Keating v. Martin*, 638 F.2d 1121, 1122 (8<sup>th</sup> Cir. 1980). The immunity enjoyed by prosecutors from § 1983 actions can be either absolute or qualified. *Brodnicki v. City of Omaha*, 75 F.3d 1261, 1266 (8<sup>th</sup> Cir. 1996). A prosecutor is entitled to absolute immunity if he or she is acting as an

advocate for the State in a criminal prosecution. *Id.* On the other hand, a prosecutor is entitled to only qualified immunity when he or she pursues actions in an “investigatory” or “administrative” capacity. *Id.*

“Absolute immunity protects prosecutors against claims arising from their initiation of a prosecution and presenting a criminal case insofar as that conduct is intimately associated with the judicial phase of the criminal process.” *Sample v. City of Woodbury*, 836 F.3d 913, 916 (8<sup>th</sup> Cir. 2016). For instance, “[t]he acts of preparing, signing, and filing a criminal complaint constitute prosecutorial functions, as they are advocacy on behalf of the government.” *Schenk v. Chavis*, 461 F.3d 1043, 1046 (8<sup>th</sup> Cir. 2006).

Prosecutorial immunity depends on the functional nature of the prosecutor’s activities; therefore, immunity is not defeated by “allegations of improper motive in the performance of prosecutorial functions.” *Sample*, 836 F.3d at 916. Absolute immunity still applies even when there are allegations of malice, vindictiveness, or self-interest. *Reasonover v. City of St. Louis, Mo.*, 447 F.3d 569, 580 (8<sup>th</sup> Cir. 2006). Absolute immunity also “covers actions taken to initiate a prosecution, even if those actions are patently improper.” *Saterdalen v. Spencer*, 725 F.3d 838, 842 (8<sup>th</sup> Cir. 2013). *See also Woodworth v. Hulshof*, 891 F.3d 1083, 1089 (8<sup>th</sup> Cir. 2018) (explaining “that a prosecutor is immune from suit even if he knowingly presented false, misleading, or perjured testimony or withheld or suppressed exculpatory evidence”).

Plaintiff’s claims against public defender James Keen are subject to dismissal. “The essential elements of a [42 U.S.C.] § 1983 claim are (1) that the defendant(s) acted under color of state law, and (2) that the alleged wrongful conduct deprived the plaintiff of a constitutionally protected federal right.” *Green v. Byrd*, 972 F.3d 997, 1000 (8<sup>th</sup> Cir. 2020). However, a defense attorney, whether appointed or retained, does not act under color of state law, and thus cannot be

liable for the alleged deprivation of constitutional rights under 42 U.S.C. § 1983. *See Polk Cty. v. Dodson*, 454 U.S. 312, 325 (1981) (stating that “a public defender does not act under color of state law when performing a lawyer’s traditional functions as counsel to a defendant in a criminal proceeding”); *Myers v. Vogal*, 960 F.2d 750, 750 (8<sup>th</sup> Cir. 1992) (stating that attorneys who represented plaintiff, “whether appointed or retained, did not act under color of state law and, thus, are not subject to suit under section 1983”); *Christian v. Crawford*, 907 F.2d 808, 810 (8<sup>th</sup> Cir. 1990) (stating that the Eighth Circuit “has repeatedly held that both retained and appointed attorneys are not liable for deprivations of constitutional rights under 42 U.S.C. § 1983 for the reason that they do not act under color of state law”); and *Rogers v. Bruntrager*, 841 F.2d 853, 856 (8<sup>th</sup> Cir. 1988) (“Public defenders do not act under color of state law for purposes of 42 U.S.C. § 1983 when performing the traditional functions of defense counsel”). To that end, counsel for plaintiff’s wife cannot be found to be liable pursuant to 42 U.S.C. § 1983 for providing her legitimate legal advice for her criminal case against her.

Accordingly,

**IT IS HEREBY ORDERED** that plaintiff’s motion to proceed *in forma pauperis* [ECF No. 2] is **GRANTED**.

**IT IS FURTHER ORDERED** that plaintiff’s motion to substitute party name [ECF No. 7] is **GRANTED**. The Clerk shall substitute defendant Leann Ryan for defendant Leann Rymes.

**IT IS FURTHER ORDERED** that within twenty-one (21) days of the date of this Order plaintiff shall pay an initial filing fee of \$1.00. Plaintiff is instructed to make his remittance payable to “Clerk, United States District Court,” and to include upon it: (1) his name; (2) his prison registration number; (3) the case number; and (4) that the remittance is for an original proceeding.

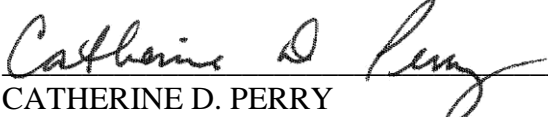
**IT IS FURTHER ORDERED** that this action is **DISMISSED** pursuant to 28 U.S.C. § 1915(e)(2)(B).

**IT IS FURTHER ORDERED** that plaintiff's motion for appointment of counsel [ECF No. 3] is **DENIED AS MOOT**.

**IT IS FURTHER ORDERED** that an appeal from this dismissal would not be taken in good faith.

An Order of Dismissal will accompany this Memorandum and Order.

Dated this 14th day of December, 2021.

  
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CATHERINE D. PERRY  
UNITED STATES DISTRICT JUDGE